STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Bell Telephone Company	:	
	:	
Filing to increase Unbundled Loop and Nonrecurring Rates	:	**ICC Docket No. 02-0864**
	:	

REPLY BRIEF OF THE STAFF OF THE ILLINOIS COMMERCE COMMISSION REGARDING THE EFFECT OF VARIOUS COURT OPINIONS

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Staff of the Illinois Commerce Commission ("Staff") respectfully submits this reply brief regarding the effect of various court opinions in response to SBC Illinois' Opening Brief On The Effect Of The *AT&T/Voices* And *Bie* Decisions On This Proceeding ("SBC Brief" or "SBC IB") and the Initial Brief On Issues On Reopening And Motion To Revise Reopening Order And Schedule Of Intervening Competitive Local Exchange Carriers ("CLEC Brief and Motion" or "CLEC IB").

I. INTRODUCTION AND SUMMARY

The Illinois Commerce Commission ("Commission") should find that the court decisions discussed in the initial briefs do not prohibit or restrict the ability of the Commission to proceed with this tariff investigation of various unbundled network element ("UNE") loop rates for Illinois Bell Telephone Company ("SBC" or "SBC Illinois"). As explained below and in the Initial Brief Of The Staff Of The Illinois Commerce Commission Regarding Impact Of Various Court Opinions ("Staff's Initial Brief" or "Staff IB"), the effect of the District Court and Seventh Circuit decisions in

Voices for Choices v. Illinois Bell Tel. Co., 2003 U.S. Dist. LEXIS 9548 (N.D. Ill. June 9, 2003) ("*Voices*") and *AT&T Communications of Illinois v. Illinois Bell Tel. Co.*, 349 F.3d 402 (7th Cir. 2003) ("*AT&T*") was to return this case, as well as the standards used for establishing rates compliant with the total element long run incremental cost ("TELRIC") methodology, to the position this case and the TELRIC standards occupied prior to enactment of 220 ILCS 5/13-408 and 13-409; and no party contends otherwise.

Similarly, as explained below, all parties agree that the Seventh Circuit's opinion in *Wisconsin Bell, Inc. v. Bie*, 340 F.3d 441, 2003 U.S. App. Lexis 16514 (7th Cir. 2003) ("*Bie*") does not restrict or preempt the ability of the Commission to proceed to decision in this tariff investigation. Although all parties come to the same conclusion, that common conclusion is based on different characterizations of the procedural and legal basis under which this case is proceeding. All parties agree that this docket was and is an investigation of the tariffs SBC elected to file with the Commission. As explained in more detail below, this uncontestable fact forms the basis for Staff and CLEC Intervenors position that there is no preemption under *Bie* because this proceeding was initiated by SBC's voluntary tariff filing. SBC's alternative position that this case is not preempted because it is a consolidated proceeding under Section 252(g) (and therefore does not bypass the Section 252 arbitration and approval procedures because it is itself a Section 252 proceeding), is based on an overbroad reading of the authority to consolidate under 47 U.S.C. § 252(g), fails to establish the prerequisite proceedings necessary for consolidation, and ignores that no party has sought or obtained consolidation (a permissive action under 47 U.S.C. § 252(g)). The Commission can and should proceed on a basis that is legally sustainable and comports with the actual status of this proceeding as reflected in the Commission's initiating and reopening orders. In other words, the Commission can and should proceed on the basis that this case is a tariff investigation proceeding voluntarily initiated at SBC's election to file revised tariffs. Because SBC has not requested any affirmative relief in its brief, and because this matter is already proceeding as a tariff investigation, the Commission does not need take any particular action at this time. Staff recommends, however, that the Commission indicate in its final order – if not previously addressed – that this matter was initiated and conducted as a tariff investigation proceeding initiated pursuant to SBC's election to file revised tariffs.

Finally, the request by various competitive local exchange carriers[1] ("Intervening CLECs" or "CLECs") in the CLEC Brief and Motion to revise the Order Reopening Proceeding And Resuspending Rates entered December 16, 2003 ("Reopening Order") should be denied. As explained below, the CLECs' assertion that this docket must proceed as a Section 10-113 proceeding to rescind or amend the Commission's May 21, 2003, order is flawed and ignores that the District Court's order (declaring 220 ILCS 5/13-408 and 13-409 to be unlawful) also rendered the Commission's May 21, 2003, order (entered in reliance upon the abatement required by those sections) null and void. Further, although Staff shares some of the CLECs' concerns regarding scheduling, the current schedule affords the parties due process and the CLECs' proposal to amend the schedule cannot be granted given their objection to any

[1] AT&T Communications of Illinois, Inc., Cimco Communications, Inc., Covad Communications Company, DataNet Systems, L.L.C., Forte Communications, Inc., McLeodUSA Telecommunications Services, Inc., RCN Telecom Services of Illinois, LLC, TDS Metrocom, LLC, TruComm Corporation, Worldcom, Inc. d/b/a MCI, XO Illinois, Inc., Z-Tel Communications, Inc. and the Illinois Public Telecommunications Association.

schedule that allows SBC's revised tariffs to become effective (at the end of the statutory suspension period) prior to entry of a final order by the Commission.

II. IMPACT OF THE *VOICES* AND *AT&T* DECISIONS ON THIS DOCKET

Based on the initial briefs filed by SBC and Intervening CLECs, no party to this proceeding is contending that the District Court and Seventh Circuit decisions in *Voices* and *AT&T* compel a particular result or establish new rules regarding fill factors and financial lives in particular or the establishment of TELRIC compliant rates in general. *See* SBC IB at 1-2; CLEC IB at 7-10; Staff IB at 3-8. While there is agreement on the general impact (or lack thereof) of the *Voices* and *AT&T* decisions on the substantive pricing rules to be considered in this proceeding, SBC and CLECs appear to overstate and understate, respectively, the meaning of other language contained in *AT&T*. While SBC focuses on timing and states that the court in *AT&T* "ratified the Legislature's goal of quickly updating stale UNE prices[,]" CLECs maintain that comments regarding timing and the need to reinstate this docket under the injunction are *dicta*. SBC IB at 1; CLEC IB at 8-9. Although Staff will address these arguments below in response to the CLECs' request for affirmative relief (that they ask be treated as a motion), a brief explanation of Staff's disagreement with SBC and CLECs is appropriate here.

Both SBC and the CLECs appear to ignore the procedural "difficulties" explicitly noted by the Circuit Court in issuing its decision in *AT&T*. *See* Staff IB at 6-7. The Commission was not a party to the appeal in *AT&T*, and the court found that this fact limited the relief that the court could grant because the Commission would continue to be bound by the injunction notwithstanding a contrary ruling on appeal. *AT&T*, 2003 U.S. App. Lexis 22961 at 17. This same limitation undercuts SBC's apparent belief that the court in *AT&T* was issuing specific binding directives to the Commission concerning the timing of this docket. Given the court's finding that it lacked the power to bind the Commission on the core issue on appeal (i.e., the validity of the District Court's ruling and injunction), it would be internally inconsistent to read the court's statements regarding the *peripheral* timing issue to be directly binding on the Commission, and any such reading must therefore be rejected. The CLECs position, namely, that the Circuit Court's statements interpreting the injunction were mere *dicta,* is similarly flawed. The Circuit Court in *AT&T* seriously questioned its ability to review the District Court's order given the order's failure to explicitly address important issues such as whether "the ICC [must] reopen, and decide under former law, the pending proceedings that the statute displaced . . . ." *Id.* at 16-17; *see* Staff IB at 6-7. The Seventh Circuit's interpretation of the District Court's injunction as requiring reinstatement of this docket was a critical component of its determination to consider the appeal, and in that regard it is not mere *dicta*. The Commission's reliance on the Seventh Circuit's interpretation of the District Court injunction is both warranted and reasonable. If CLECs or any other party believes that the Seventh Circuit's interpretation of the District Court's injunction was in error, they should – as noted below – seek clarification of the scope and application of the injunction from the District Court.

Although there is no dispute on the effect of *Voices* and *AT&T*, Staff does not fully agree with SBC's assertions. SBC states that certain comments by the court in *AT&T* "ratified" what it calls "the Legislature's *goal* of quickly updating UNE prices " and "endorsed the General Assembly's view of the dangers of uneconomically low UNE prices." SBC IB at 1-2 (emphasis in original). The legislation under review in *AT&T* did not explicitly establish the goal or view espoused by SBC, nor did the Circuit Court explicitly ratify or endorse any such goal or view. Indeed, the Circuit Court explicitly affirmed the District Court order declaring the legislation to be unlawful. Although Staff does not concur with SBC's characterization of the legislation or its interpretation of the Circuit Court's statements, there is no need to further consider this issue because SBC neither contends nor explains how its assertions have a direct impact on the issues in this case. While timing and scheduling is a general issue in this docket, no one asserts that the *AT&T* decision compels or interprets the District Court injunction to require conclusion of this proceeding by a specific date. Moreover, reading the injunction itself or the Seventh Circuit's interpretation of the injunction to mean that the Commission was literally ordered to act would improperly interpret those decisions to impose duties beyond the requirements of the 1996 Act that permits, but does not require, state commission's to act. See 47 U.S.C. § 252(e)(5) (Establishing that FCC will act and preempt a state commission if it fails to carry out delegated responsibilities under the Act); *see also Voices*, 2003 U.S. Dist. LEXIS 9548 at 6-7. If anything, such language merely restarts any federal "clock" under which the Commission can act or not act. Finally, SBC does not contend that the *AT&T* decision resulted in any change to applicable TELRIC principles as a result of the endorsement it asserts.

III. IMPACT OF THE *BIE* DECISION ON THIS DOCKET

As explained below, the initial briefs filed by the parties establish that further proceedings in this docket are not preempted under the holding in *Bie*. Further, an analysis of the parties' arguments demonstrates that the Commission can, and should, proceed on the basis that this case is a tariff investigation voluntarily initiated pursuant to SBC's election to file revised tariffs. Although SBC's analysis of *Bie* is similar to Staff's and CLECs' in most respects, and results in a common assertion that the Commission is not preempted from further proceedings, its reasoning is flawed and other conclusions reached by SBC are erroneous. Most notable in this regard is SBC's assertion that *Bie* somehow mandates that it be allowed to withdraw the very tariffs resulting from this docket at some future date. SBC IB at 7. Because this assertion relates to possible future action, it does not present an issue that the Commission need consider in this docket. Because SBC has not requested any affirmative relief in its brief, and because this matter is already proceeding as a tariff investigation, the Commission does not need take any particular action at this time. Staff recommends, however, that the Commission indicate in its final order – if not previously addressed – that this matter was initiated and conducted as a tariff investigation proceeding initiated pursuant to SBC's election to file revised tariffs.

SBC asserts that proceeding to "decision" in this docket is "fully consistent" with the 1996 Act and *Bie*. SBC IB at 3. SBC observes that the basis for the district court's finding that the Wisconsin commission's order was inconsistent with the 1996 Act was that "it 'requires [SBC] to sell certain combinations of network elements using a procedure that allows an entrant to bypass the Telecommunications Act's provisions' and correspondingly 'interferes with the incumbent's ability to invoke the interconnection agreement procedures'." SBC IB at 3-4 (citations omitted). SBC points out that the Seventh Circuit in *Bie* similarly found that the Wisconsin commission's requirement was inconsistent with the 1996 Act "by 'enab[ling] would-be entrants to bypass the federally ordained procedure.'" *Id*. at 4. SBC further states that "[t]he fundamental holding of Bie is that a state commission may not 'bypass the federally ordained procedure' for creating access and interconnection rights and obligations set forth by Congress in section 252 of the 1996 Act." *Id*. at 5. SBC's analysis in this regard corresponds with Staff's analysis. *See* Staff IB at 10-14 (concluding that *Bie* held state tariffing requirements are inconsistent with the 1996 Act to the extent that they *require* an ILEC to offer an alternative means of obtaining interconnection rights without an interconnection agreement that allows a CLEC to completely bypass the federal process). CLECs similarly describe *Bie* as holding that "the Wisconsin commission's action was preempted because it imposed on the ILEC an alternative means for the CLEC to obtain interconnection that the Court thought conflicted with the process provided for in the Communications Act." CLEC IB at 11. Although this similar reading of *Bie* led Staff, SBC and the CLECs to each conclude that further proceedings in this docket are not preempted, the parties diverge in (i) how they reached that conclusion and (ii) their assessment of the future effect of the *Bie* holding.

Staff's Initial Brief explained that, under the holding in *Bie,* tariffs that do not allow a CLEC to completely bypass the federal process (Staff IB at 18-19) and tariffs resulting from an ILEC's voluntary submission to a state tariffing process (Staff IB at 15-17) do not conflict with the 1996 Act and are not preempted. Thus, a tariff containing language limiting the availability of a product or service to carriers that have entered into an interconnection agreement with the ILEC was submitted as an example of a tariff that would fit within the "no bypass" category of acceptable tariffs under *Bie*. *Id*. at 18. Staff concluded that the Commission could, consistent with *Bie*, review SBC's tariff filing and order revisions if necessary (i.e., proceed to decision) because SBC had voluntarily invoked the instant tariff review process. *Id*. at 15-17. An analysis under the "no bypass" category was not relevant because SBC had voluntarily invoked the instant tariff review process. *Id*. at 19. Further, the issue of limiting language was not raised in any testimony (and, thus, also beyond the proper scope of this proceeding). Staff, however, recommended that the Commission consider taking certain actions to clarify the voluntary nature of SBC's filing if not addressed in SBC's brief. *Id*.

CLECs similarly reasoned that further proceedings here were not preempted because "at its inception, this case was *initiated* by SBC as a tariff proceeding through the filing of its proposed UNE tariffs on December 24, 2002." CLEC IB at 11 (emphasis in original). CLECs also pointed out, as did Staff, that "SBC indicated its willingness to continue this case as a proceeding to review its proposed tariffs." *Id*., *see* Staff IB at 9. Thus, CLECs concluded that the *Bie* decision does not prevent this case from proceeding as a review of SBC's proposed tariffs because "the element of state commission compulsion of the ILEC that was pivotal to the *Bie* decision is not present here." CLEC IB at 11. CLECs also point out that most of the CLECs in this case have interconnection agreements with SBC that, in general, typically provide for incorporation of Commission approved rates into the interconnection agreement or, more recently, establish conditions under which the CLEC may (or may not) order services and products under SBC's tariffs. CLEC IB at 11-12. CLECs do not contend that incorporation by reference of Commission approved tariffed rates transforms a tariff investigation into a federal arbitration or other proceeding under Section 252. Rather, CLECs appear to be pointing out the practical benefits of state tariff investigations establishing UNE rates. Although Staff acknowledges that -- by virtue of the terms and conditions of various CLECs' interconnection agreements with SBC -- the results of this docket will no doubt be incorporated by reference into many interconnection agreements, this fact does not appear to have any direct bearing on preemption under *Bie*.[2] Nevertheless, Staff and CLECs are in agreement, for the reasons indicated above, that proceedings in this docket are not preempted under *Bie* due to SBC's voluntary election to invoke the Commission's tariff review process.

CLECs also attempt to distinguish the instant case from *Bie* by asserting (i) that 220 ILCS 5/13-801 creates an independent state law requirement for carriers subject to alternative regulation under 220 ILCS 5/13-506.1 to offer UNEs "by tariff",[3] and (ii) that SBC has elected to continue to operate under its alternative plan of regulation under Section 13-506.1. CLEC IB at 12, fn. 14. CLECs appear to pose a plausible rationale for the non-preemption under *Bie* of any requirements under Section 13-801, imposed only on carriers operating under an alternative regulation plan,[4] that would otherwise

[2] As noted below in response to SBC's assertions, Staff does not foreclose or ignore the Commission's ability to consolidate proceedings under Section 252. *See* 47 U.S.C. § 252(g). Indeed, consideration of cost studies and UNE rates may be ideal candidates for consolidation. But the present proceeding is not a proceeding under Section 252 or any of the other sections subject to consolidation under Section 252(g), and thus is not subject to consolidation under 47 U.S.C. § 252(g). Further, even assuming, *arguendo*, that this tariff investigation proceeding could be part of a consolidated proceeding under Section 252(g), the 1996 Act vests state commissions with permissive authority to consolidate proceedings. 47 U.S.C. § 252(g) ("[A] State commission may, to the extent practical, consolidate proceedings under sections 214(e), 251(f), 253, and this section . . . ."). No party has requested consolidation, nor has the Commission granted or ordered consolidation.

[3] Section 13-801 does not, itself, specifically mention tariffs or tariffing. See 220 ILCS 5/13-801. Section 15-501, however, provides that "[n]o telecommunications carrier shall offer or provide telecommunications service unless and until a tariff is filed with the Commission which describes the nature of the service, applicable rates and other charges, terms and conditions of service, and the exchange, exchanges or other geographical area or areas in which the service shall be offered or provided." 220 ILCS 5/13-501. While "telecommunications services" that are offered or provided must be tariffed, nothing in Sections 13-501 or 13-801 explicitly prohibits such tariffs from containing limiting language, as discussed above, to satisfy the "no bypass" category of acceptable requirements under *Bie*. Thus, this aspect of the CLECs' argument may overstate the matter.

[4] Staff notes that it is only the "requirements or obligations [imposed by Section 13-801] . . . that exceed

constitute a requirement to offer an alternative means of obtaining interconnection rights that allows bypass of the federal interconnection agreement process. Namely, CLECs appear to argue that such requirements would not be preempted because they would result, as a matter of law and fact, from SBC's voluntary submission to those requirements by electing to operate under, and receive the benefits of, an alternative plan of regulation. Although some of the rates modified by SBC's tariff filing may be for products offered pursuant to its "alternative regulation" based obligations under Section 13-801, the tariff filing in this case only proposes rate adjustments and neither establishes nor modifies the underlying offerings. Further, the extent of SBC's obligations under Section 13-801, and the argument that such requirements may be preempted, are issues in the currently pending appeal of the Commission's final order in Ill. C.C. Docket 01-0614. *Illinois Bell Telephone Company, Inc. v. Illinois Commerce Commission*, Case No. 02 C 6002 (N. Dist. Of Ill, filed Aug. 22, 2002). Accordingly, CLECs' attempt to distinguish *Bie* based on SBC's Section 13-801 obligations is limited to those offerings that exceed federal requirements, and clearly exceeds the scope of issues properly raised in this proceeding.

In its initial brief, SBC focuses on the "no bypass" category of acceptable tariffing requirements under *Bie*, and asserts that the instant proceeding "does not *bypass* the section 252 process, but rather works *within* it . . . ." SBC IB at 5 (emphasis in original). SBC's argument is premised on its assumption that the instant proceeding is a

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or are more stringent than those obligations imposed by Section 251 of the federal Telecommunications Act of 1996 and regulations promulgated thereunder" that are conditioned upon alternative regulation status. 220 ILCS 5/13-801(a). Thus, the CLECs' theory would not apply to those requirements set forth in Section 13-801 that merely provide an independent state obligation to provide what is also required under the 1996 Act.

consolidated proceeding authorized under Section 252(g) of the 1996 Act. *Id*. Although SBC's no preemption conclusion is acceptable under the "voluntary election" reasoning described above, SBC's stated reasoning for reaching that conclusion is significantly flawed.

Staff agrees that Section 252(g) provides the Commission with authority to consolidate certain proceedings arising under the 1996 Act, but that authority is limited and does not allow consolidation of all proceedings implementing the requirements of the 1996 Act. Section 252(g) provides as follows:

> (g) CONSOLIDATION OF STATE PROCEEDINGS.--Where not inconsistent with the requirements of this Act, a State commission may, to the extent practical, consolidate proceedings under sections 214(e), 251(f), 253, and this section [252] in order to reduce administrative burdens on telecommunications carriers, other parties to the proceedings, and the State commission in carrying out its responsibilities under this Act.

47 U.S.C. § 252(g). As is clear from the statutory language, the grant of authority of state commissions to consolidate proceedings pursuant to Section 252(g) is limited to the consolidation of proceedings arising "under sections 214(e), 251(f), 253, and [252]." *Id*. Sections 214(e) (regarding provision of universal service), 251(f) (regarding exemptions, suspensions, and modifications for rural carriers), and 253 (regarding removal of barriers to entry, preservation of state authority, state and local government authority, preemption, commercial mobile service providers and rural markets) have no apparent application to the case at hand. Thus, the only possible application of Section 252(g) is if this proceeding is a consolidation of two or more proceedings arising under Section 252. No such claim can be made here. The only state commission "proceedings" provided for under Section 252 are arbitration proceedings and approval

proceedings. *See* 47 U.S.C. § 252(b) and (e).[5] No one can even suggest that there has been a request for interconnection/negotiation, that a petition for arbitration was filed during the period from the 135th to the 160th day after the request for negotiation, that "open issues" have been identified, or that any of the numerous pleading and filing requirements set forth in the federal statutory scheme established pursuant to Section 252(b) and codified in Part 761 of the Commission's Rules governing arbitrations (83 Ill. Adm. Code 761) have been followed. Similarly, none of the indicia of an approval proceeding are present, most notable being the absence of an interconnection agreement.

The type of proceeding SBC alludes to has occurred in the past. Indeed, the proceeding originally establishing the rates SBC now seeks to modify resulted from such a proceeding. See *Second Interim Order*, <u>Investigation into forward looking cost studies and rates of Ameritech Illinois for interconnection, network elements, transport and termination of traffic</u>, ICC Docket Nos. 96-0486 / 96-0569 (consol.) (February 17, 1998) (hereafter "TELRIC Order"). The very first paragraph of the TELRIC Order made clear that the Commission severed the pricing issue from several then pending arbitrations, and consolidated the pricing issues for resolution under Section 252:

> On August 21 and 23, 1996, respectively, Teleport Communications Group, Inc. ("TCG") and AT&T Communications of Illinois, Inc. ("AT&T") filed motions to sever, from then-pending arbitrations under Section 252 of the federal Telecommunications Act of 1996 ("Act") between Ameritech Illinois, on the one hand, and AT&T and MCI Metro Access Transmission Services, Inc. ("MCI"), on the other, the issue of what prices should be established, under Sections 252(d)(1) and 252 (d)(2) of the Act, for Ameritech Illinois' provision of interconnection,

[5] Although Section 252 also provides for mediations, it is not clear that an informal mediation constitutes a "proceeding" and, even if it did, there does not seem to be any basis to assert that the instant proceeding involves a mediation.

> unbundled network elements ("UNEs") and transport and termination of local traffic pursuant to the interconnection agreements that were the subject of those arbitrations. On September 9 and 10, 1996, respectively, Sprint Communications, L.P. ("Sprint") and AT&T filed petitions to open separate proceedings to address those pricing issues. In response to these petitions and motions to sever, on September 25, 1996, the Commission entered an order initiating Docket 96-0486 to investigate Ameritech Illinois' forward looking cost studies and establish Section 252(d) prices for Ameritech Illinois' provision of interconnection, UNEs and local transport and termination under its interconnection agreements. In initiating Docket 96-0486, we contemplated that the prices that we adopted in the docket would be incorporated subsequently into Ameritech Illinois' interconnection agreements through amendments to those agreements.

TELRIC Order at 1. The TELRIC Order also makes clear that that consolidated proceeding also included consideration of UNE tariffs filed by SBC (then Ameritech). *Id*. at 2. Unlike the situation in 1996, the instant proceeding is in no way derived from a decision in pending arbitrations to sever the issue of permanent rates for consideration in a consolidated generic docket. While the Commission certainly has that authority, it has not utilized that authority in this proceeding and SBC's assertion in this regard is little more than a fiction.[6] Indeed, SBC admits that the instant "proceeding was initiated as an investigation of SBC's tariff and will continue as such . . . ." SBC IB at 6.

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[6] Where, as here, there is no preemption issue because an ILEC has voluntarily invoked the state tariff approval process, there would be no apparent obstacle to the Commission's ability to combine a tariff investigation with consolidated Section 252 proceedings, if they existed, considering the same rates. The consolidation of consolidated Section 252 proceedings and a tariff investigation in other contexts may, however, raise an issue under *Bie*. The importance of the exclusive federal review provided for Section 252 proceedings was key to the Court's determination that state procedures can be preempted, even if they would result in decisions based on the same pricing standards. *Bie* at 445 ("An appeal from the commission's resolution of an entrant's challenge to a tariff would go to a state court, rather than a federal court, a difference that cannot be assumed to be inconsequential."). Because state tariff determinations may be appealed to State courts, the consolidation of Section 252 proceedings and a state tariff proceeding present potential issues under *Bie*. Even if consolidation of tariff investigations and consolidated Section 252 proceedings is an issue, this would not prevent the Commission from subsequently initiating a tariff proceeding following conclusion of a consolidated Section 252 proceeding. In any event, a tariff investigation is not a Section 252 proceeding and, therefore, any argument based on that premise must fail.

SBC's position that this matter is a consolidated proceeding under Section 252(g) is also inconsistent with its view on the scope and conduct of this proceeding. The scope of this proceeding has been controlled by SBC through its tariff filing. For instance, the limitation of this proceeding to consideration of UNE Loop rates was dictated by SBC's December 24, 2002, tariff filing. Similarly, the scope of the issues following the Reopening Order, and in particular the determination of whether this proceeding would allow and be based on updates of the cost studies and testimony filed many months ago, was driven by SBC's determination to stand on its tariffs, cost studies and testimony as originally filed. The conduct of a tariff investigation in this manner is fully appropriate, given that the scope of a tariff investigation is necessarily controlled by the scope of the filed tariffs under investigation (especially for tariffs voluntarily filed by a carrier).[7] In contrast, Section 252 arbitration proceedings (whether the typical two carrier type or the atypical consolidated type) afford all parties equal control of the scope and conduct of the proceeding. *See* e.g. 47 U.S.C. § 252(b). Thus, if this proceeding were to somehow be considered a Section 252(g) proceeding, consolidating all or part of several Section 252(b) proceedings, then SBC would not be entitled to the control of the scope and conduct of this proceeding that it has been afforded.

The foregoing analysis demonstrates numerous flaws in the reasoning by which SBC arrives at its no preemption conclusion. On the other hand, Staff's and CLECs' reasoning reaches the same conclusion on other grounds that are consistent with the

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[7] Staff notes that to the extent that a party believes that an investigation of other tariffs or other terms and conditions not under review is warranted, it can file a complaint to request the Commission to institute an investigation of those tariffs or terms and conditions under 220 ILCS 5/9-201 and 9-250.

Seventh Circuit's decision in *Bie*, the facts of this case (with all parties agreeing this case was and is a tariff investigation initiated by SBC), and the Commission's treatment of this matter as a tariff investigation in its order initiating proceeding and Reopening Order. Consequently, it cannot be contested that the record and comments in briefs establish the following: (i) that this proceeding was commenced as a tariff investigation proceeding under state law upon SBC's voluntary filing of revised tariffs; (ii) that SBC has elected to stand on its previously filed tariffs, cost studies and testimony following reopening; (iii) that no party, including SBC, has requested the Commission to conduct this proceeding as part of a consolidated proceeding under 47 U.S.C. § 252(g); (iv) that the Commission has not taken any action to conduct this proceeding as part of a consolidated proceeding under 47 U.S.C. § 252(g); and (v) that this matter is not an arbitration proceeding under 47 U.S.C. § 252(b). Accordingly, absent a request from SBC to proceed in some other manner, it is Staff's opinion that this matter can, and should, proceed as a tariff investigation. Further, there appears to be no need for further representations from SBC. The filings of the parties and the Commission's previous orders establish that SBC is on notice and recognizes that this matter is proceeding as a tariff investigation. Consequently, SBC has subjected itself to the Commission's authority to investigate, and to the extent necessary, modify SBC's tariff. SBC is fully aware of its ability to seek affirmative relief to change the status of this matter and, absent such an affirmative request, SBC evidences its continuing election to submit to and continue with this tariff investigation proceeding.

IV. RESPONSE TO JOINT CLECs

The CLEC Brief and Motion makes several arguments, each of which is in essence a motion for extension of the schedule in this proceeding. The CLECs argue that this proceeding is not, for any of several reasons, subject to either the time limitations that Section 9-201 of the Public Utilities Act imposes upon tariff review proceedings, or any time restrictions imposed upon the Commission by the Circuit Court of Appeal for the Seventh Circuit in AT&T Communications of Illinois, *et al*. v. Illinois Bell Telephone Co., *et al*., 349 F.3d. 402, 2003 U.S. App. Lexis 22961 (consolidated)(7th Cir. 2003). The Staff, although sympathetic to, and sharing many of, the CLECs' scheduling concerns, urges rejection of the CLECs' arguments, and the CLECs' several Motions.

The CLECs first argue that the Commission's May 21, 2003, order canceling the tariffs at issue in this proceeding and dismissing this docket was a final, appealable Order, which was moreover not required by Section 13-408, and from which no appeal was taken. CLEC Brief and Motion at 3-7. Therefore, contend the CLECs, the only proper procedural course to reopen the proceeding is to reopen under Section 10-113(a) of the Public Utilities Act, which permits the Commission to rescind, alter or amend its prior orders. CLEC Brief and Motion at 5-7; *see also* 220 ILCS 5/10-113(a). This being the case, the CLECs assert that this proceeding is not subject to the statutory time limits governing tariff proceedings.[8] CLEC Brief and Motion at 7. Accordingly, the CLECs contend that the proceeding can lawfully conclude on some date after June 16, 2004, without the tariffs as filed by SBC going into effect. Consistent

[8] The CLECs appear to be prepared to treat this proceeding as a reopening under Section 10-113(a) without insisting on more formal notice.

with this argument, the CLECs urge the Commission to alter the Reopening Order, as follows:

> Accordingly, the Commission should modify the Reopening Order to delete the purported "resuspension" of SBC's proposed UNE tariffs, since the suspension provisions of Section 9-201(b) of the PUA are not applicable to this Section 10-113 proceeding. Moreover, as set forth below, there are ample reasons why this proceeding on reopening should be scheduled to allow more than six months for its completion.

Id.

This argument should be rejected. The CLECs' argument depends entirely upon the premise that the Commission's May 21, 2003, Order was legally valid, notwithstanding the various federal courts' actions in the *Voices for Choices* litigation. Voices for Choices, *et al*. v. Illinois Bell Telephone Co., *et al*., 03 C 3290 (N.D. Ill. 2003); see also Voices for Choices, *et al*. v. Illinois Bell Telephone Co., *et al*., 03 C 3290, 2003 U.S. Dist. Lexis 9548, (N.D. Ill. 2003) (June 9, 2003); AT&T v. Illinois Bell.

However, this premise does not withstand scrutiny. In entering the *Reopening Order*, the Commission clearly viewed its May 21 order as lacking legal force or effect, *see* Reopening Order at 7, with good reason. Specifically, as a general[9] rule, where a statute is declared unconstitutional or invalid, it is void as of its enactment. *See, e.g.*, In re G.O., 191 Ill. 2d 37, 43; 727 N.E. 2d 1003; 245 Ill. Dec. 269 (2000); People v. Manuel, 94 Ill. 2d 242, 244-45; 446 N.E.2d 240; 68 Ill. Dec. 506 (1983). In other words, the statute is inoperative, just as if it had never been passed, and the net effect is to

[9] *But see* Hill v. Cowan, 202 Ill. 2d 151, 781 N.E. 2d 1065; 269 Ill. Dec. 875 (2002); *cert. den*., – U.S. --; 123 S. Ct 1812; 155 L.Ed. 2d 1685 (2003) (doctrine applies only to facially unconstitutional statutes); Kinsey Distilling Sales Co. v. Foremost Liquor Stores, Inc., 15 Ill. 2d 182; 154 N.E.2d 290 (1958) (state statute declared unconstitutional because of conflict with federal law merely unenforceable for the duration of the federal enactment)

leave the law in force as it was before enactment. Hurst v. Capitol Cities Media, Inc., 323 Ill. App. 3d 812, 820-21; 754 N.E. 2d 429; 257 Ill. Dec. 771 (5^{th} Cir. 2001).

This being the case, this docket's abatement by operation of Section 13-408(c) is clearly a nullity. *See* 220 ILCS 5/13-408(c) ("The proceeding in ICC Docket 02-0864 is hereby abated as of the effective date of this amendatory Act of the 93rd General Assembly"). Thus, it follows that the Commission's May 21, 2003, order is *also* a nullity, inasmuch as that order was a ministerial or "housekeeping" act taken in recognition of the peremptory abatement of the docket by the specific terms of the statute. The May 21 order being a legal nullity, there is nothing, and indeed, as a legal matter, never was anything from which to take an appeal. Thus, there is no final order, and no basis to resort to Section 10-113, which clearly contemplates a final order. Instead, the proceeding is simply returned to the *status quo ante*. This is, of course, precisely what the Commission did in its *Reopening Order*.

This being the case, there is no reason to modify the *Reopening Order*. The CLECs' request for such relief should be denied.

The CLECs next argue that the Reopening Order incorrectly concludes that the Circuit Court of Appeals' order in AT&T v. Illinois Bell does not impose a duty upon the Commission to conclude this matter expeditiously. CLEC Brief and Motion at 7-10. They assert that the AT&T v. Illinois Bell decision's holding is limited to mere affirmation of the District Court's order, with the entire fifteen-page decision -- other than the word "affirmed" -- being *dicta*, including the Circuit Court's statement that the Commission is "compelled by the injunction to reinstate the proceeding in its Docket 02-0864, which the state law had terminated, and to proceed to decision as expeditiously as possible".

CLEC Brief and Motion at 9. Consistent with this, the CLECs argue that the injunction imposes no obligation upon the Commission to either reinstate this proceeding, or to complete it by any specific date.[10]

Essentially, the CLECs object to the proposition that the Circuit Court's decision constitutes an interpretation of the terms of the permanent injunction, which, they assert, constitutes nothing more than the bare statement that Sections 13-408 and 13-409 are declared unlawful and the Commission is permanently enjoined from implementing them. Id. Accordingly, they urge the Commission to ignore everything in the Circuit Court's Order over and above the word "affirmed." Id. at 9-10.

The CLECs' position is one that can be taken by parties in the comfortable position of not being bound by the injunction. The Commission, which *is* bound by the injunction, and whose members must comply with the injunction on pain of contempt, has sensibly taken a somewhat broader view. The Circuit Court's opinion contains the following passage:

> **The ICC also is compelled by the injunction to reinstate the proceeding in its Docket 02-0864, which the state law had terminated, and to proceed to decision as expeditiously as possible. The ICC must attempt to produce a rate that complies with TELRIC as of 2003**--and if doing this entails use of SBC's current fill factors, the ICC is free to use them. **And it must do this speedily.** A rate that is long out of date, as this 1997 rate is, frustrates the goals of TELRIC every bit as much as does a rate generated under the flawed state legislation. SBC and its rivals alike are entitled to an updated rate that comports with federal law.

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[10] The CLECs' argument could be interpreted to mean that everything in judicial decisions other that the precise holding (e.g., "affirmed", "reversed and remanded") is mere surplusage, which does not bind parties to the action. This appears, however, to constitute a wholesale repudiation of the common law. *See* 11 Illinois Law and Practice, Common Law §2 (common law includes judicial declarations). The CLECs' argument implies that the reasoning behind the holding is irrelevant, with only the few words that actually dispose of the proceeding having force or effect. Notwithstanding the merits of this argument, the Commission should reject it as being misplaced.

AT&T v. Illinois Bell, 2003 U.S. App. Lexis 22961 at 23-24 (emphasis added)

The Commission might perhaps be forgiven for concluding that this language indicates that the injunction is mandatory in this regard, in light of the statement that it is "compelled by the injunction to reinstate [this proceeding]…and to proceed to decision as expeditiously as possible[;]" it is further, and somewhat redundantly admonished to accomplish this "speedily." Anyone actually bound by the injunction is poorly advised to conclude that this passage is somehow an advisory statement with which the court does not expect the Commission to comply.

This is especially true in light of the fact that the Circuit Court expressed a great deal of concern that the injunction was excessively vague. *See* AT&T v. Illinois Bell, 2003 U.S. App. Lexis 22961 at 15-17 (Circuit Court recites terms of the injunction and then asks: "What does this mean? … What, then, does this injunction do?"); *see also*, id. at 18 (Circuit Court characterizes injunction as "vague"). It is safe to conclude from the language of the Circuit Court's decision that it viewed the injunction as vague, and sought to remedy this vagueness in its decision by giving the Commission specific instructions regarding compliance with the injunctions terms.

The Commission, which is bound by the injunction, has chosen to interpret the Circuit Court's decision as if the court meant what its decision very clearly says. The Staff recommends no departure from this lawful and prudent course.

The CLECs argue that there is no evidence that the Circuit Court knew of the Commission's May 21 order when it directed the Commission to reinstate this proceeding, and consequently believed that reinstatement of the matter could be readily accomplished. The CLECs appear to conclude that the Circuit Court would not have ordered the docket reinstated if it had known of the May 21 order.

It is not clear how this argument avails the CLECs. First, the Circuit Court was presumably familiar with the statute, including the provision abating the docket by operation of law; subsection (c) of the statute appears in its published opinion. AT&T v. Illinois Bell, 2003 U.S. App. Lexis 22961 at 12. Accordingly, the Circuit Court's knowledge, or lack thereof, regarding the procedural posture of the matter at the Commission is, in this context, of no importance, since the Circuit Court clearly understood this proceeding to have been abated by operation of Section 13-408(d). Second, there is no compelling reason to conclude that the Circuit Court was concerned about how the matter was then postured before the Commission. It was concerned not about the procedural posture of this docket (if, at that time, there was a procedural posture), but rather about the fact that the existing rates date from 1997. *See* AT&T v. Illinois Bell, 2003 U.S. App. Lexis 22961 at 24 ("A rate that is long out of date, as this 1997 rate is, frustrates the goals of TELRIC every bit as much as does a rate generated under the flawed state legislation.")

Moreover, if the CLECs do not believe that the Commission is obligated to comply with the Circuit Court's order, they are not without a remedy. Inasmuch as they believe the Circuit Court's order to be either essentially without effect, or entirely incorrect, they are free to seek clarification of this point from the courts. If the District Court did not intend, notwithstanding the Circuit Court's order, for the Commission to reopen this proceeding and pursue it expeditiously, it will doubtless welcome the CLECs' application for clarification. This is especially true in light of the fact that the

CLECs include among their number the major plaintiffs in the *Voices for Choices* litigation.

In short, the Commission's decision to give effect to the Circuit Court opinion was entirely proper. The CLECs' argument that it was not should be rejected.

Finally, the CLECs argue that the schedule adopted in this proceeding does not allow sufficient time to properly scrutinize SBC's tariffs and cost studies. CLEC Brief and Motion at 13 *et seq*. Indeed, the CLECs are of the view that the 11-month schedule authorized by Section 9-201 is inadequate in a matter of this scope. Id. at 16-17. The CLECs observe that the *Triennial Review* proceedings are also on accelerated and contemporaneous schedules, are similarly resource-intensive, and involve substantially the same parties. Id. at 14-15. The CLECs note that this will adversely affect the Commission as well as the parties, inasmuch as it will be required to conduct its deliberations on these four significant matters during the same period. Id. at 15. The CLECs finally contend that a shortened schedule benefits SBC, who they consider to be largely to blame for the position that the parties now find themselves. Id. at 18. They argue that "SBC is entitled to no sympathy here -- but for SBC's own self-inflicted legislative misadventures, Docket 02-0864 would have been completed, and new UNE rates set for SBC, before the end of 2003." Id. at 18.

These statements are generally correct, as far as any of them goes. However, they are precatory; they certainly do not set forth a legal basis upon which the Commission may act. The Commission has a job to do: one that must be done consistent with the Public Utilities Act and the injunction. There is simply no legal authority to extend the schedule in this proceeding in the manner requested by the CLECs.[11] Accordingly, the CLECs' several motions must be denied.

V. CONCLUSION

WHEREFORE, for all the reasons set forth herein, the Staff of the Illinois Commerce Commission respectfully requests that its recommendations be adopted in this proceeding.

Respectfully submitted,

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[11] The Staff notes that Section 9-201 does not require that tariff proceedings be completed within 11 months; rather, it permits tariffs to be suspended for a period not to exceed 11 months. 220 ILCS 5/9-201(b). Thus, there is no legal impediment, at least in statute, to this case exceeding 11 months in total length. However, CLECs would be compelled to pay rates pursuant to SBC's proposed tariffs during the period that the suspension ended and new Commission-approved rates went into effect. The Staff is informed and believes that the CLECs will not countenance this. Accordingly, the Commission has directed this proceeding to conclude within the statutory period of suspension.